

FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS & JOHN

)
BANK OF NOVA SCOTIA,)
)
)
Plaintiff,)
) Civil No. 2005-26
v.)
)
OMAR BROWN, Jr. and JU-ANA BROWN,)
)
)
Defendants.)
)

ATTORNEYS:

Matthew J. Duensing, Esq.
St. Thomas, U.S.V.I.
For the plaintiff,

Omar Brown, Jr.
St. Thomas, U.S.V.I.
Pro se defendant,

Ju-Ana Brown
St. Thomas, U.S.V.I.
Pro se defendant.

ORDER

GÓMEZ, C.J.

The plaintiff in this matter, Bank of Nova Scotia ("BNS"), commenced this debt and foreclosure action on March 1, 2005, against *pro se* defendants Omar Brown, Jr. and Ju-Ana Brown (collectively, the "Defendants"). The record reflects proof of service of the summons and complaint on each of the Defendants. None of the Defendants filed an answer or otherwise made an

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appearance in this matter. In May, 2005, BNS moved for entry of default against the Defendants pursuant to Federal Rule of Civil Procedure 55(a).¹ In June, 2005, the Clerk of Court entered defaults against each of the Defendants. BNS now moves for default judgment against the Defendants pursuant to Federal Rule of Civil Procedure 55(b)(2) ("Rule 55(b)(2)").

Federal Rule of Civil Procedure 55(b)(2) allows courts to enter a default judgment against a properly served defendant who fails to file a timely responsive pleading. *Anchorage Assoc. v. Virgin Is. Bd. of Tax Rev.*, 922 F.2d 168, 177 n.9 (3d Cir. 1990). The rule further provides "no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein." Fed. R. Civ. P. 55(b)(2); *Murphy v. C.W.*, 158 Fed. Appx. 393, 396 (3d Cir. 2006) (unpublished). Additionally, the plaintiff must file an affidavit "stating whether or not the defendant is in military service and showing necessary facts to

¹ That rule provides:

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.

Fed. R. Civ. P. 55(a).

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support the affidavit" 50 U.S.C. app. § 521(b)(1) (the "Servicemembers Civil Relief Act"). "The entry of a default judgment is largely a matter of judicial discretion, although the Third Circuit has emphasized that such 'discretion is not without limits, however, and we have repeatedly stated our preference that cases be disposed of on the merits whenever practicable.'"

Signs by Tomorrow - USA, Inc. v. G.W. Engel Co., 2006 U.S. Dist. LEXIS 56456 at *5-6 (D.N.J. 2006) (quoting *Hritz v. Woma Corp.*, 732 F.2d 1178, 1181 (3d Cir. 1984)).

Here, BNS has failed to meet its burden of showing that default judgment is appropriate. In the instant motion, BNS does not indicate whether the Defendants are infants, incompetent, or serving in the military. BNS has not submitted, nor does the record contain any affidavits or evidence of any kind to show that the Defendants are not infants, incompetent, or serving in the military. BNS has failed to comply with the requirements of Rule 55(b)(2) and the Servicemembers Civil Relief Act. See, e.g., *Bank of Nova Scotia v. George*, 2008 U.S. Dist. LEXIS 11786 at *6 (D.V.I. 2008) ("BNS is . . . not entitled to default judgments against the Defendants because it has not complied with the Servicemembers Civil Relief Act"); *Ross v. Baker*, 2006 U.S. Dist. LEXIS 77216 at *4 (W.D. Mich. 2006) (denying a default judgment motion where the "[p]laintiffs have not tendered an affidavit

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stating . . . that the defendant is not an infant or incompetent person"); *United States v. Simmons*, 508 F. Supp. 552, 552-53 (E.D. Tenn. 1980) (denying the plaintiff's motion for a default judgment because the plaintiff failed to provide a sufficient affidavit showing that the debtor was not in military service).

Accordingly, it is hereby

ORDERED that BNS's motion for default judgment is **DENIED** without prejudice. Should BNS re-file its motion accompanied by the necessary evidence, the Court will give its request renewed consideration.

DATED: April 17, 2008

S_____

CURTIS V. GÓMEZ
Chief Judge

Copies to: Matthew J. Duensing, Esq.
Omar Brown, Jr., *pro se*
Ju-Ana Brown, *pro se*